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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted] 253

LOUIS E. WOLCHER, *Petitioner*

v.

UNITED STATES, *Respondent*

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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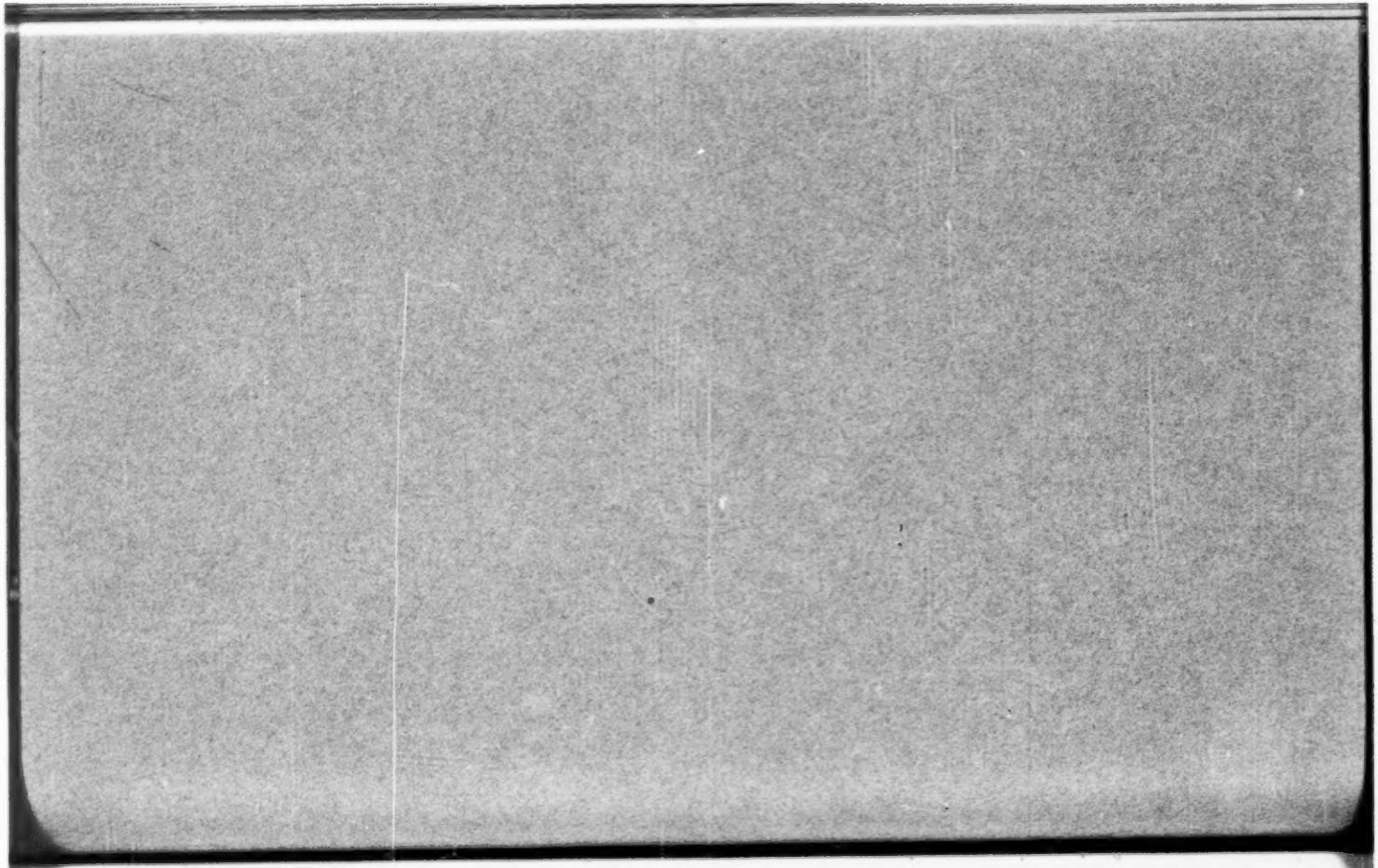

INDEX TO APPENDICES

Page

Appendix A—Opinion of Court of Appeals, Wolcher v. United States, 218 F. 2d 505 ..... 1a

B—Opinion of Court of Appeals on first appeal, Wolcher v. United States, 200 F. 2d 493 ..... 8a

C—Excerpts from record on first appeal, Wolcher v. United States, No. 12992 ... 18a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,109
Dec. 28, 1954

LOUIS E. WOLCHER, *Appellant*,
v.
UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern District of California, Southern Division

BEFORE: HEALY, ORR, and POPE, *Circuit Judges*
HEALY, *Circuit Judge*

This matter is before us on appeal from a judgment of conviction on a charge of attempted income tax evasion.

Appellant had earlier been convicted on the same charge, and we reversed for error committed in the course of the trial. Wolcher v. United States, 200 F. 2d 493. The background of the case is rather fully developed in that opinion, and we shall here touch but briefly on the evidence. During the tax year involved (the fiscal year ending June 30, 1944) appellant collected large sums from the sale at wholesale of whisky at overceiling prices. Wolcher himself was not a wholesaler of whisky, but operated or was interested in a number of taverns or bars. The sales in question were made through San Francisco liquor wholesalers. The purchasers gave checks to the wholesalers in the amount of the ceiling price and paid the overceiling price in cash directly or indirectly to Wolcher. Wolcher reported no income from the sales.

The government through various witnesses established the details of these transactions, and Wolcher himself admitted them while on the stand. He contended only that he made no profit from the operations for the reason that in acquiring whisky he himself was obliged to make overceiling payments to one William Gersh in amounts which approximately offset the cash paid him by the buyers. At the former trial Gersh testified for the government that the large sum of money sent him by Wolcher was to be in

payment for coin machines which Gersh thereafter attempted unsuccessfully to buy for Wolcher. He said the money was returned except for a minor amount spent in acquiring for Wolcher a number of phonographs. Gersh did not testify on the second trial.

The sufficiency of the evidence to sustain the conviction is not disputed. What is claimed is that certain prejudicial errors were committed on the trial. The assignment most heavily relied on is an alleged error in the giving of an instruction. During the course of a lengthy charge to the jury the court said: "So that in my opinion brings the issue of the case down to a very simple (question), and that is this—that since the Government has proved and the defendant has admitted receiving the cash over ceiling prices, the issue is whether you do or do not believe the testimony and the story told by the defendant in the case. If you believe his story, then you should return a verdict of not guilty. If you are convinced beyond a reasonable doubt that his story should not be believed, then you are justified in returning a verdict of guilty."

It is argued that the instruction shifted the burden of proof from the government to appellant; that it took from the jury the question of whether the government's evidence established the charge beyond a reasonable doubt; that in effect it told the jury to disregard all other evidence in the case save the testimony and story of the defendant and to decide his guilt or innocence solely upon his testimony; and that it told the jury to discount or ignore weaknesses in the government's case if the jurors found appellant's testimony to be unworthy of belief.

Naturally the propriety of the instruction is to be considered in context. In the course of its charge the court gave the jury the following instruction: "The presumption is that the defendant is innocent and that presumption continues until such time as the Government has proved the guilt of the defendant beyond a reasonable doubt. The Government has the burden of proving the guilt of the defendant. That burden never shifts at any stage of the proceeding to the defendant. The defendant has no obligation of any kind to go forward and prove that he is innocent."

In immediate connection with the passage under attack, and as preliminary to it, the court gave the instructions shown on the margin.*

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*"The indictment in this case charges the defendant with wilfully and knowingly attempting to defeat and evade a large part of his income tax for the fiscal year ending June, 1944. The amount by which his net income is alleged to have exceeded the amount he reported on his return was approximately $45,000, as alleged in the indictment. The indictment was filed pursuant to a federal statute which makes it a criminal offense for any person to wilfully attempt in any manner to evade or defeat any tax imposed by the revenue laws of the United States. Now the defendant plead not guilty to that charge, and so that's the issue. Did he wilfully and intentionally attempt to evade the payment of income taxes due the United States for this fiscal year ending in June, 1944?

"Now the Government has the burden of proving that the defendant had taxable net income which he did not report, and that his act in so doing, failing to report it, was wilful and intentional.

"Now what do we mean when we speak about net income? Well, there is of course a very simple definition of it. Most of the men on the jury, I think, have heard it stated—maybe the ladies not so often, unless you are following some occupation—that it means the gross income, the total income that a man has, less the deductions or expenses or expenditures that the law says he can take from it; then what he has got left is his net income. Now that's what the defendant is charged in this case with non-payment of, is the net income. Now the taxable income of an individual includes anything by way of a gain or profit or income that he might get from salaries or wages, business, compensation for personal services, from trade or business, or sales or dealings in property; and it also includes any profit or income, net in character, that a man would obtain from any illegal transaction as well as a legal transaction. He has to account for all of his net income to the United States.

"Now it is not necessary for the Government to prove the exact amount of the evasion, if any, nor the exact amount charged in the indictment. It would be sufficient if the Government shows that a substantial amount of money, consisting of net income, was wilfully evaded by the defendant in the case.

"Now I think it might be well if I very briefly stated to you what the Court believes is the issue of the case as it appears from the contentions respectively of the parties—the Government on the one hand and the defendant on the other hand. The Government contends, as appears from the argument made by Government counsel, that the cash monies that the Government proved the defendant received from the sale of liquor and which the defendant

We think in the circumstances and in the light of the accompanying instructions the jury could not rationally have understood the particular passage as shifting the burden of proof to the defendant, or as authorizing them to disregard frailties in the government's proof. As already said, the government had shown and the appellant had admitted that in the course of his liquor transactions during the tax year under inquiry he had received large sums in cash which he did not report as income. Obviously in such condition of the record he had some explaining to do; and as the court indicated, he undertook specifically to show that the cash did not represent a profit because he had to pay out equivalent sums as overceiling acquisition cost.

The government had clearly established a prima facie case. Several of the circuits have held in prosecutions for

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admitted that he received, were income and were net income, and that the whisky was purchased for the purpose of making a profit on it in its resale and not for the benefit of the defendant's own taverns, or his friends'. The Government contends that there were no records of the transaction kept by the defendant, and that that was so that he could keep the proceeds without paying any tax on them. The Government contends, as stated by the Government lawyer, that the defendant's account of sending large amounts in cash through the mail and otherwise to someone in the East is a story that is fabricated and should not be believed by you. That, I think very briefly, is the Government's contention.

"The defendant, on the other hand, admits that the black market transactions were had by the defendant, but contends that he made no profit in connection with these transactions and that therefore he had no net income and that therefore he is not chargeable with any evasion of income taxes; that he made no profit in the matter, because he had to pay out certain monies in connection with the transactions and that therefore the net result was that he had no profit in the matter, and that therefore he is not chargeable with a violation of federal statute.

"So that in my opinion brings the issue of the case down to a very simple (question), and that is this—that since the Government has proved and the defendant has admitted receiving the cash over ceiling prices, the issue is whether you do or do not believe the testimony and the story told by the defendant in the case. If you believe his story, then you should return a verdict of not guilty. If you are convinced beyond a reasonable doubt that his story should not be believed, then you are justified in returning a verdict of guilty."

income tax evasion that when a prima facie case has been made out the burden of going forward with evidence is on the accused. United States v. Stayback, 212 F. 2d 313, 316-317; United States v. Smith, 206 F. 2d 905, 910; United States v. Link, 202 F. 2d 592, 593-594; United States v. Hornstein, 176 F. 2d 217, 220. The holdings appear well grounded. In this instance, however, the court instructed the jury that no duty of going forward rested on the accused, and we think it unnecessary to consider whether the decisions mentioned should be followed here. If the jury were convinced beyond a reasonable doubt that there was no truth in appellant's defense, then, certainly, as the court advised them, they were justified in returning a verdict of guilty. In sum, the instruction did not impose on appellant the burden of going forward. On the contrary, it left upon the government the onus of disproving his affirmative defense beyond a reasonable doubt.

The claim that the jury were told to disregard all evidence other than the testimony of the defendant himself presents a different question. It is pointed out that other witnesses had given testimony of a nature corroborative of the defendant—principally in respect of the great difficulty of obtaining whisky at the time other than on the black market; and it is said that in effect the jury were instructed to disregard these corroborative circumstances.

We think the point is without force. The problem confronting the jury was not whether whisky was difficult to obtain or whether appellant was able to obtain it. Admittedly he did obtain the whisky in question, albeit at what he said was a heavy overceiling price. The instruction could hardly be understood by the jury as telling them to disregard these, or other circumstances in evidence, which might tend to corroborate appellant's account of his transactions or the asserted necessity of his paying overceiling prices. The choice of the term "his story" may not have been a happy one, but we think in the framework of this case the term would naturally be understood as having reference to appellant's defense as a whole, including whatever corroboration it might have in the testimony of others or in the circumstances in evidence.

The second specification of error is the refusal of the court to give a requested instruction reading as follows: "in determining whether the defendant made any profit on his purchases and sales of whisky, you must determine, from all the evidence in the case, the actual amount the defendant paid for the whisky and the actual amount the defendant received for the whisky; in determining what amount the defendant paid for any whisky involved in this case, you must add to the actual cost of said whisky, any amounts of money, if any, that Wolcher paid to any person as a bonus or commission or fee for procuring such whisky for him."

The proposed instruction was on its face misleading and there was no error in refusing to give it. The jury were not required to determine the "actual amount" the defendant paid for the whisky or the "actual amount" received for it. It was enough if he were found to have received net income which he failed to report. The instructions actually given sufficiently covered the general subject.

Another error claimed is the ruling of the court on a question asked appellant regarding a conversation he had with William Gersh, when, as he said, he approached the latter in the spring of 1943 for the purpose of acquiring the whisky. The government objected to the interrogation as calling for self-serving or hearsay testimony, and the court sustained the objection.

A sufficient answer to the assignment is that the substance of the conversation was actually related by Wolcher, and is in the record. He testified that at that time he had a conversation with Gersh with respect to obtaining whisky, and that Gersh told him he (Gersh) had friends in the liquor business who could get it for him; that in the conversation Gersh mentioned the necessity of paying an overceiling price. Wolcher testified, of course, to the details of his asserted transactions with Gersh, the amounts of money he had sent the latter, the quantity of liquor received from him, and the amount of the overceiling price he had to pay him. Those, rather than details of conversations preliminary to them, were the essential matters Wolcher needed to get before the jury. Appellant made

no offer of proof with respect to further items of the alleged conversation which might have been thought material. We think the ruling of the court in this respect was not prejudicial, and certainly it was not reversible error.

Finally it is claimed that the court erred in refusing to reopen the trial after the parties had rested, in order that appellant might call Gersh as a witness. Appellant was familiar with Gersh's testimony given at the former trial. He had had opportunity to subpena Gersh and knew where he lived. He claims that he was not aware of the presence of the witness in San Francisco until shortly before the time of making the request for a reopening, and he suggests that he had a right to rely upon the government to call Gersh. We think otherwise. Under the circumstances the court's refusal to reopen was well within its discretionary authority. Cf. *Horowitz* v. *United States*, 5 Cir., 12 F. 2d 590; *Brink* v. *United States*, 6 Cir., 60 F. 2d 231.

Affirmed.

(Endorsed:) Opinion. Filed Dec. 28, 1954. Paul P. O'Brien, Clerk.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12,992

Nov. 17, 1952

LOUIS E. WOLCHER, *Appellant*,
vs.
UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court,
Northern District of California, Southern Division.

Before HEALY, ORR and POPE, Circuit Judges.
POPE, Circuit Judge.

The appellant was convicted under an indictment charging that he wilfully and knowingly attempted to evade and defeat some $30,000 of the income and victory taxes due and owing by him for the fiscal year ending June 30, 1944, in violation of § 145b of the Internal Revenue Code. The questions presented on this appeal all relate to claimed errors in admitting and excluding evidence. It is therefore necessary to state only enough of the facts to indicate the significance of the evidence rejected or admitted over objection.

The theory of the Government's proof was that during the year in question Wolcher collected large sums from the sale of whiskey from which he derived income which he failed to return. The sales were made through San Francisco liquor wholesalers who would receive checks for the ceiling price of the liquor while the purchaser would pay an additional over ceiling amount in cash which went to Wolcher. His income tax return reported no gross income from sales of liquor at wholesale (which the sales above described were) except for an item of $3,000 profit made on a transaction not involved here.

Wolcher admitted the over-ceiling transactions, but contended that although he received those proceeds he made no profits from these operations for the reason that in

purchasing or acquiring the liquor, he himself was obliged to make over-ceiling payments or bonuses in a large amount, and that the sums so paid wiped out any possible profit. He testified that the amounts so laid out by him were paid to one William Gersh, stating that on some shipments the over-ceiling bonus paid Gersh amounted to $20 and on others to $25 a case. He fixed the amount which he had thus paid Gersh as approximately $115,000. Gersh was the publisher of a New York City trade paper called "The Cash Box" devoted entirely to coin machines. Wolcher operated a concern which sold coin operated machines and he had known Gersh for 15 or 20 years. Wolcher testified that he sent substantial sums of money to Gersh during the period in question and that these remittances were made by check and by cash either through the mail or by express or delivered to Gersh in person.

Gersh was called as a rebuttal witness for the Government and while he stated that in 1943 he had handled money belonging to Wolcher in amounts totaling $85,000, his version was that the money was sent to him to obtain coin machines for Wolcher. His testimony was that at that time coin machines were very difficult to procure, and that they could be bought only by cash payment in advance of the full purchase price. This, he said, was why Wolcher sent him these sums of money. He testified that he bought ten phonographs for Wolcher during this period, the purchase amounting to $5250, but that he had returned all the balance of the $85,000 to Wolcher.

Wolcher's version of the $5250 purchase which Gersh made was that he Wolcher, had seen in a coin machine industry publication known as "The Billboard" an advertisement offering these machines for sale, and that he had sent a letter ordering them. He said that since the sellers wanted a deposit on the deal he telephoned to Gersh to make the deposit for him out of the money which Gersh had received from him and then had on hand, and that this is how Gersh happened to put up the $5250 on these machines. He testified that there was no shortage of coin machines; that during the year he purchased hundreds of thousands of dollars worth of such equipment; that al-

though the only equipment of that character then for sale was used equipment, yet it was advertised for sale in large quantities.

Wolcher was asked on cross-examination: "Did you make the statement to Mr. Kirby that you were making in excess of $20 a case on all whiskey which you sold? He answered that he did not recall making such a statement. Thereafter Kirby was called and testified that in the latter part of 1942 or the first part of 1943 he had a conversation with Wolcher relative to the liquor transactions. He was asked to relate the conversation. The witness was permitted to answer, over objection, but was able to recall only that there was "a conversation of approximately $20 a case profit". The Government then produced a statement which Kirby had made in writing in 1948 at the instance of an agent of the Revenue Bureau. He was permitted to examine it and then was asked if on such examination his recollection as to the conversation inquired about had been refreshed. He replied in the negative. He then testified that when he had made the statement, the matter was then more fresh in his recollection than it was now. Thereupon the statement was offered and received in evidence over the objection of the defendant, upon statement of counsel for the government that it was offered as his "past recollection recorded". The objection was both that it was not a proper mode of impeachment, as well as that it was hearsay and otherwise not competent.

The document thus received was in question and answer form and contained the statement that Kirby had a very poor memory but that he would guess that the conversation took place in 1943, and at that time Wolcher, talking to Kirby about shipments of whiskey, stated that his profit "was estimated at $20 a case. That is the estimate of profit would be $20 a case."

This 1948 statement purporting to describe a conversation in 1943, should not have been admitted. We do not discuss the question of the propriety of attempting impeachment in the unusual manner here employed, for we think that since Wolcher was the defendant a statement of a material fact, not amounting to a confession of guilt,

if properly proven, would be admissible as an admission of an accused defendant.[1]

The statement was incompetent and inadmissible for two reasons: Such a memorandum when used as past recollection recorded, where the witness "has no recollection of the facts stated in it", must have been made "while the occurrences mentioned in it were recent and fresh in his recollection". Maxwell v. Wilkinson, 113 U.S. 656, 658. The recording, in 1948, of something said to have happened in 1943, was not sufficiently fresh and vivid to be probably accurate. This memorandum failed to measure up to any of the usual requirements of trustworthiness.[2] Furthermore, the statement was not properly verified by the witness. He did not testify that at the time he made the written statement he then knew it to be true. All that he said was that at the time the statement was made his recollection was fresher than it was at the trial. Its assertions were vouched for by no one.

During the taxable year in question Wolcher had been a member of a partnership known as "The Gold Coast" which was engaged in the sale of liquor by the glass. The business and the income of this partnership had nothing to do with the charge in this case.[3] The Government called as one of its witnesses an accountant who had been employed by Wolcher to prepare a partnership tax return for The Gold Coast for the fiscal year ending July 1, 1944. He produced a working copy of the return he had prepared. This return was never filed and differed materially from the return of the Gold Coast which was actually filed. In the return which the witness had prepared the inventory of the Gold Coast was shown to be some $31,000 whereas the return actually filed showed a much smaller

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[1] Dimmick v. United States, (9 cir.) 116 F. 825, 831; Ercoli v. United States, (CADC) 131 F. 2d 354, 356; see Wigmore on Evidence, § 821, note 4, and § 1039, note 2.

[2] The cases are collected in Wigmore on Evidence, 3d Ed., § 745.

[3] It did appear that some of the whisky from which Wolcher is claiming to have made the profits here in question was sold by or through him to the Gold Coast.

inventory, some $16,500. The working copy of the partnership return thas prepared by the accountant was received in evidence over appellant's objection.

It was conceded by the Government that the Gold Coast return was not involved in the case because any profit shown thereon would not be included in Wolcher's return for the year here in question. It was offered and received by the court on the theory that its purpose was to show "wilfullness and intent".

When there is proof that an act has been done and the question arises whether it was done with criminal intent, other similar acts by the accused may be proven for the purpose of demonstrating that he was acting at the time alleged in the indictment with criminal intent and volition. In such cases the fact that the prior acts may themselves be criminal in character does not exclude them.

At the same time we must bear in mind that the commission of a wrongful act charged cannot ordinarily be established by proof that the defendant has previously committed other wrongful acts. It is fundamental that such a method of proof is inadmissible merely for the purpose of showing that the defendant has a generally criminal disposition or character.[4] Hence, if in order to prove intent, evidence is to be received of other wrongful acts, the acts thus proven must be of such character that as a matter of logic they tend to demonstrate a criminal intent at the time of the commission of the act now charged. For one thing the prior acts must be similar to the one now charged.[5]

The caution which the courts must exercise in such cases is well set forth in Boyer v. United States, (CADC) 132 F. 2d 12, 13. In that case, while the prior act proven was similar to that charged, the receipt of the proof of the prior act was held to be error because it occurred nearly two years before the date charged in the indictment. The general rule relating to admission or exclusion of evidence of such acts was stated as follows (p. 13): "In various

[4] See the cases cited in Shea v. United States, (6 cir.) 236 F. 97, 104.

[5] Cf. Wigmore on Evidence, 3d Ed. § 302.

circumstances, therefore, evidence of earlier acts good or bad may be admitted, as tending in one way or another to show a man's state of mind, when he is charged with a later fraud. But the fact that intent is in issue is not enough to let in evidence of similar acts, unless they are "so connected with the offense charged in point of time and circumstances as to throw light upon the intent."

In the case before us the circumstances relating to the preliminary draft of the partnership return were in no way connected "in point of circumstances" with the offense charged in the indictment. The only resemblance between the two sets of acts would be that both had to do with tax returns. But the partnership return was of an entirely different nature from the transaction for which the defendant was here on trial. The evidence relating to the partnership was not logically relevant either to prove or disprove the intent or knowledge of Wolcher in connection with his performance of the acts shown at the trial and charged in the indictment.

There is complete lack of proof that the accountant's tentative partnership return was correct, or that the partnership return actually filed was not. But in the circumstances it must have been offered on the theory that the change from the larger inventory in the preliminary draft, to the smaller in the return as filed, meant that some act of chicanery was afoot. The jury would be apt to place that construction on it, and were thus invited to infer that the failure to include the tentative inventory in the final partnership return was a wrongful act. Upon this unwarranted assumption they were further permitted to infer defendant's guilt from the fact of a prior unrelated, dissimilar wrongful act. As stated in Boyer v. United States, supra, (p. 13) "No doubt the alleged fact that a man committed a crime on another occasion tends to show a disposition to commit similar crimes. But when the prior crime has no other relevance than that, it is inadmissible. Its tendency to create hostility, surprise, and confusion of issues is thought to outweigh its probative value. The law seeks 'a convenient balance between the necessity of obtaining proof and the danger of unfair prejudice.' The alleged fact that a man committed one forgery

clearly increases the likelihood that he committed another forgery, but testimony to the earlier crime is not, for that reason alone, admissible." We hold that it was error to admit the working copy of the Gold Coast partnership return in evidence.

What we have said applies also with respect to an inventory which the accountant had prepared to accompany the working copy of the partnership return. In addition, it is noted that there was no evidence that the values attached to the inventory were correct or where they were obtained. They may have been gleaned by inquiry from miscellaneous persons who may or may not have been qualified to state values. None of these persons was called. The instrument was wholly without foundation. Compare United States v. Kelley, (2d cir) 105 F. 2d 912, 917.

The court also admitted in evidence a paper or memorandum obtained by a Government special agent from Wolcher's office files. The paper was dated February, 1936, and was a carbon copy of a purported note sent to the Seattle office of Wolcher's business. It bore the initials "L.E.W." and "E.C." It contained language to the effect that the writer or writers "should like to receive a check from you very soon against our private account, so that we can show a similar profit in the coming year and perhaps make considerable more money". The paper was wholly without foundation; there was no proof of its genuineness or who wrote it, or that it was a document made in the regular course of business, or otherwise. Its receipt over appellant's objection was error.

After the witness Gersh had testified on rebuttal that the sums he received from Wolcher were sent to him because coin machines were very difficult to purchase and could only be obtained by one armed with the full cash price, Wolcher testified on surrebuttal that at the time in question coin machines were plentiful and easily purchased and that they could be purchased on time. For the purpose of corroborating his testimony in this respect he offered in evidence volumes containing all weekly issues of the "Billboard" for the year here in question. These issues contained numerous advertisements of offers to sell

coin machines on terms permitting down payments of substantially less than the full amount of the price. The evidence showed that the "Billboard" was a national publication and a trade paper specializing in this sort of information. They were excluded as immaterial.

It is generally held that the state of the market in securities or commodities may be proven by reports or quotations in newspapers and trade journals.[6] If the market in coin machines at the time in question was as claimed by Wolcher, the existence of the numerous offers to sell here sought to be proven would tend to corroborate Wolcher's testimony. We think that the offered evidence should have been received.

For a like purpose Wolcher offered in evidence correspondence between himself and a New Jersey company which was engaged in the business of selling similar machines. The correspondence was offered for two purposes. One was to show that the particular purchase of phonographs to which Gersh had testified had actually been negotiated by Wolcher himself and not by Gersh as the latter claimed. The second was to disclose that the coin machines were readily available without the necessity of cash in advance as Gersh had testified. The court refused to admit this evidence.

We think this evidence was material. It would have had weight in determining the question whether Wolcher or Gersh was telling the truth with respect to why the money was sent by Wolcher. It should have been admitted.[7]

Among the items of bonuses which Wolcher testified he had to pay in order to get whiskey during the year in question was a bonus or under-the-counter payment to one Worthy made to procure some 500 cases of whiskey furnished to the Gold Coast. Wolcher sought to show that

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[6] Numerous cases are collected in a note at 43 A.L.R. 1192.

[7] In Caten v. Salt City Movers & Storage Co., (2d cir.) 149 F. 2d 428, 433, the court held that the trial court had properly admitted in evidence a letter received from a dealer in the type of merchandise there in question. The letter was received as evidence of the values as stated in the dealer's letter.

this particular payment was occasioned by the fact that the quantity then procured was an especially large one and one very difficult to secure in the condition of the market for whiskey at that time. To show that there was a special reason for the demand and the payment of the bonus, Wolcher sought to prove by an employee of the seller that the particular purchase was very much out of line with the ordinary purchases of Gold Coast or by the Silver Rail, another liquor selling place in which Wolcher had an interest. This evidence was excluded.

It would appear that the size of the purchase and its relation to the purchases commonly made for this place would be a part of the circumstances then present likely to throw some light upon the probability or improbability of Wolcher's statement.

The question remains whether these erronous rulings were prejudicial. If they were to be considered singly, each by itself, the situation might be different. Thus the exclusion of the evidence that the purchase of liquor on account of which Wolcher claimed to have paid a $10,000 bonus to Worthy was disproportionate in amount and value to other sales to the Silver Rail and the Gold Coast, might not be prejudicial in view of the fact that the witness Grusenemeyer testified to substantially the same matter. The evidence thus excluded might well be regarded as merely cumulative, and therefore its exclusion not prejudicial.

But with respect to the remaining erroneous rulings, when we consider them all together and in the light of the sharp conflicts of testimony which were left to be resolved by the jury, we cannot disregard the errors committed as without probable substantial influence upon the verdict of the jury. The rule which we endeavor to apply is that stated in Kotteakos v. United States, 328 U.S. 750, 764: "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps when the departure is from a constitutional norm, or a specific command of Congress. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the

whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

We cannot say that these errors are those which "do not affect substantial rights" and hence that they should be disregarded.[8] The errors here listed require a reversal since in our judgment "the error might have operated to the substantial injury of the defendant" United States v. Grady, (7 cir.) 185 F. 2d 273, 275.

The judgment is reversed and the cause is remanded with directions to grant the appellant a new trial.

(Endorsed:) Opinion. Filed Nov. 17, 1952. Paul P. O'Brien, Clerk.

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[8] Rules Criminal Procedure, 52a.

APPENDIX C

TRANSCRIPT OF RECORD

No. 12992

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOUIS E. WOLCHER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

NOTE: A copy of the transcript of record in No. 12992, duly certified by the Honorable Paul P. O'Brien, Clerk, has been lodged with the Clerk of the United States Supreme Court together with the Transcript of Record on the second appeal, No. 14109.

The following excerpts are set forth in this Appendix C for convenience.

The page references in brackets [p.] are to the printed Transcript of Record, No. 12992, on appeal. Page references to the original typescript of record have been omitted.

[p. 557]

* * * * *

WILLIAM GERSH

called on behalf of the Government in rebuttal, sworn.

Court: Q. Your full name? A. William Gersh.

Q. Spell your last name. A. G-e-r-s-h.

Q. And your business or occupation? A. Publisher, magazine.

Q. Publisher? A. Publisher.

Q. What magazine? A. The Cash Box Magazine.

The Court: Cash Box. Proceed.

Direct Examination

By Mr. Campbell:

Q. Now if you will keep your voice up, Mr. Gersh, so that all of us can hear you? What is the [p. 558] nature of

the magazine which you publish? A. Covers the coin machine business.

Q. In other words, it is a trade publication? A. Yes, sir.

Q. And where is the office of that magazine? A. New York City.

Q. How long have you published it? A. Since '42.

Q. Are you acquainted with the defendant here, Louis Wolcher? A. Yes, sir.

Q. How long have you known him? A. About fifteen years.

Q. Over that period of time, have you had any business transactions with him? A. Yes, sir.

Q. I will ask you, Mr. Gersh, whether at any time you ever assisted him in the acquisition of whiskey? A. No, sir.

Q. Did you ever at any time introduce him to anyone for the purpose of his being able to acquire whisky? A. Not to my knowledge, sir.

Q. Are you acquainted with a man by the name of Frank Mayer? A. I don't remember that name; don't ever remember meeting him.

Q. Have you yourself had any transactions of any kind wherein large quantities of whiskey by cases have been acquired either for yourself or anyone else? A. No, sir.

Q. With particular reference to the year 1943, did you handle any money belonging to the defendant Louis Wolcher? A. Yes, sir.

[p. 559] Q. And in what amounts? A. Well, there was the entire total amount, was $85,000.

Q. And what was the reason, the purpose, for which you were handling that money? A. I was to obtain coin machines whenever and wherever possible.

Q. And what was the reason, the purpose, for which you were handling that money? A. I was to obtain coin machines whenever and wherever possible.

Q. Prior to 1943, had you handled money for Mr. Wolcher in that connection? A. Not that I remember, sir.

Q. Was that the only period of time in which you did? A. Yes, sir.

Q. Did you obtain any coin machines for him? A. Yes, sir, I did.

Q. Do you recall at this time how many and in what amount? A. Well, I bought ten phonographs for him, amounting to about $5,250, and I think there was $2,000 involved in parts, or something in there, and that was—that is all I remember at this time, sir.

Q. What was done with the balance of the money which he sent you? A. It was sent back to him by check.

Q. Now, there has been some testimony here that on June 15th, 1943, he sent you a check in the amount of $5,000. Do you recall that? A. Yes, sir, he did.

Q. And do you recall the purpose for which you received it? A. Yes, sir, at the time I was supposed to buy some equipment.

[p 560] Q. Did you purchase that equipment for him? A. No, sir, wasn't able to obtain it, and I returned the money to him.

Q. How soon did you return the money after you received it? A. Returned it the same day.

Q. And in what form did you return it? A. I think it went back to him in cash, sir.

Q. How did you happen to send it back to him in cash? A. Those were his instructions.

Q. There has also been evidence here as to a draft of $30,000 dated November 3rd, 1943. Defendant's Exhibit E: I will ask you if you saw the original of that particular document? A. Yes, sir, I did.

Q. When did you see that? A. Mr. Wolcher came to my office—

Q. In New York City? A. In New York City.

Q. Do you recall on what date? A. I think it was the—well, I think it was on the 4th, around that time. I don't remember the exact date, now sir. Or I could—if I could remember it, I could refer to it.

Q. All right. A. But he came to my office with this check and asked me to come down to the bank and cash it for him.

Q. Did you go to the bank with him? A. Yes, sir, we went downstairs to the bank.

Q. What bank did you go to? [p. 561] A. Corn Exchange National Bank.

Q. And what branch? A. It is known as the Fourth Avenue Branch.

Q. And who did you see there? A. Well, we went up to the, I went up to the teller's window here, I think and handed him the check, and I think they turned it over to the manager or assistant manager or whoever he was, the branch manager.

Q. Do you recall his name? A. No, I don't recall his name, sir.

Q. Does the name Requa—is that familiar to you? A. Requa—yes, sir, that is familiar to me.

Q. Is that the gentleman you saw on that occasion? A. I wouldn't be certain, sir.

Q. I see, all right. Now Mr. Wolcher was with you on that occasion? A. Yes, sir.

Q. All right, relate what occurred. A. Well, he asked for thousand dollar bills, and I put the check over to the man there, and he said that in the first place they didn't have that many thousand dollar bills, and in the second place they wouldn't issue it until they had cleared the check or draft, whatever it is, and then I asked them, then he said he wanted it deposited to my account.

Q. Who said that? A. The manager there. So I signed the back of it and put it into my account, and they gave him up to what my account could stand, which I think at that time was $10,000—ten $1,000 bills.

[p. 562] Q. Who was that given to? A. That was given to Mr. Wolcher.

Q. In your presence? A. Yes, sir.

Q. All right, what happened to the other $20,000 represented by that check after it cleared? A. Well, about three

or four days later, Mr. Wolcher called me up and asked me to meet him at the bank, which I did, and we went down to the bank and withdrew a check for the balance of $20,000, which was due him, and he got twenty $1,000 bills.

Q. Do you have your bank statements with you, Mr. Gersh? A. Yes, I do.

Q. And do they show the withdrawal of $10,000 and the $20,000? A. Yes, sir.

Mr. Friedman: Well, I will object to that: the bank statements are the best evidence.

Q. (By Mr. Campbell): I am going to ask you to produce them at this time, the statements as of November the—of November of 1943. A. (producing).

Q. This sheet which you have handed me is the original sheet received by you, a transcript of the Cash Box account with the Corn Exchange? A. That's right.

Q. For the month of November, 1943? A. Yes, sir.

Mr. Campbell: I will offer this in evidence at this time.

The Court: Let it be admitted and marked next in order. [p. 563] The Clerk: Government's Exhibit 37 admitted and filed in evidence.

(Whereupon bank ledger sheet for November, 1943, for the Cash Box, identified above, was thereupon received in evidence and marked Government's Exhibit No. 37.)

Q. (By Mr. Campbell): I call your attention, Mr. Gersh, to the fact that on November 8, 1943, there is shown a withdrawal of $10,000 and a deposit of $30,000, and on November 12th, a withdrawal of $20,000. Are those the items to which you refer? A. Yes, sir.

Q. Now, aside from the original $5,000 and the $30,000 referred to here, what other sums did you receive from Mr. Wolcher? A. Well, at one time there, he sent me about $3,000 or $3,300, and we couldn't do anything with it. I know it was sent for some specific purpose, some machine that was advertised, or machines, and where he just couldn't get them, and we immediately sent it back.

Q. Yes, Do you recall other items that he sent to you? A. Yes, sir, he sent me $5,000 later on, and we sent that back to him within a few days, and then he sent $12,500 at one time. I don't remember the exact date. And we sent that back to him. We couldn't do a thing for him at that time.

Q. Did he also on any occasion deliver to you $30,000 in cash? [p. 564] A. We received a package with $30,000 in cash.

Q. Do you recall when that was? A. Oh, I think that was in '44, in January, I think—just sometime around there.

Q. Was that on or about January 4th, 1944? A. Somewhere around there, sir.

Q. For what purpose did you receive that money? A. I believe that he phoned me at the time and said something about phonographs being available.

* * * * * * * * * *

[p. 575] Q. I see. You have stated you received around $85,000 altogether from Mr. Wolcher, all of which you returned with the exception of the money used for the purchase of ten phonographs and parts, is that correct? A. That is right sir.

Q. As I understand your testimony, you received it for the purpose of purchasing coin operated machines if they were available, is that correct? [p. 576] A. That is right, sir.

Q. How was it that all this money seemingly was in cash? A. Well, at that time most of the business done in this industry was done in cash.

Q. Why was that? A. Well, very simply because shipping was very difficult, the war was on, anything that was shipped and hadn't been paid for could reach some territory and somebody would say they didn't need them at that moment, and that was the end of it.

Q. Some of the equipment was subject to seizure, too, was it not? A. Yes, sir, some of it was.

Mr. Friedman: You mean slot machines?

Mr. Campbell: Yes.

Mr. Friedman: Well, let's hear what it is.

Q. (By Mr. Campbell): Was it the custom in the trade at that time to deal entirely in cash in the purchase and sale of coin operated machines? A. Well, it wasn't the—not everybody would deal in cash. There was people that knew each other and they would send checks to each other, and so forth, but throughout the industry in view of the very hard shipping trouble that everybody had, and in view of the fact that machines were priced so far in the sky, everybody wanted to received cash. They wouldn't take a check, wouldn't take a chance on a check because they were afraid payment would be stopped after the machines were on the way, or after the machines got there somebody would say they couldn't [p. 577] use them, so they always tried to get cash to cover it up.

Q. I am going to show you several photostats of checks drawn on the Corn Exchange. Are you familiar with the original documents of which those are photostats? A. Yes, sir.

Q. That is your signature appearing on each of those checks. A. Yes, sir.

Q. Do you know where the originals of those checks are at this time? A. No, sir, I don't. The Treasury Department took them.

Q. Did you make a search for them before leaving New York? A. Yes, sir.

Q. And you were unable to find them?

Mr. Friedman: He said the Treasury Department took them.

Mr. Campbell: I understand.

Q. (By Mr. Campbell): Did you also inquire of the Treasury Department in New York if they had the checks? A. No, sir, not before I left.

Mr. Campbell: I will state that I have made inquiry of the Treasury Department and am unable to locate the

original documents. Those are the photostats of the original documents? A. Yes, those are the photostats.

Mr. Friedman: Well, since you volunteered that information, Mr. Campbell, would you mind telling me how you got the photostats?

Mr. Campbell: The documents unquestionably [p. 578] were in the possession of the Treasury Department at one time and photostats were taken.

Mr. Friedman: You got them from the Treasury Department then?

Mr. Campbell: These photostats, yes. Not from the witness.

Mr. Friedman: All right, I just wanted to know how you got them.

Q. (By Mr. Campbell): What were the checks drawn for, Mr. Gersh? A. These are all money being returned to Mr. Wolcher, so far as I can see here.

Q. I notice some of them are made to cash? A. That is right, sir.

Q. Did you send cash for those? A. Secured the cash and sent it back to him, that is right, sir.

Q. Was that pursuant to any instructions you had received? A. That is what he told me to do, the way I would receive it and send it back.

Q. So far as you know, does this represent all the money you received from Mr. Wolcher, with the exception of that spent for the ten phonographs and the parts? A. That is right, sir.

Mr. Campbell: I am going to offer these in evidence at this time as Government's Exhibit next in order, one exhibit.

Mr. Friedman: May I see them first?

Mr. Campbell: Oh, pardon me (handing documents to counsel).

[p. 579] Mr. Friedman: All right, Mr. Campbell, what is your offer?

Mr. Campbell: I offer them in evidence as one exhibit.

The Court: They will be admitted and marked next in order.

(Thereupon photostatic copies of eight checks were admitted into evidence as Government's Exhibit No. 38.)

Mr. Campbell: These checks are all on imprinted checks with one exception, of The Cash Box, Corn Exchange Bank Trust Company, Fourth Avenue Branch, New York. The first date is June 15th, 1943, payable to the order of cash, $5,000. The endorsement: "Okay to cash, Bill Gersh."

Check No. 1424, The Cash Box, August 12th, 1943, to Corn Exchange Bank Trust Company of New York; payable to cash, $3,300, signed Bill Gersh, and endorsed Bill Gersh.

Check No. 1464, August 31st, 1943, to the Corn Exchange Bank and Trust Company, pay to the order of Lou Wolcher, $5,000, signed Bill Gersh, and bearing endorsement Lou Wolcher.

Check No. 1557, October 13th, 1943, pay to the order of cash, $12,500, drawn to the Corn Exchange Bank Trust Company, signed Bill Gersh and endorsed Bill Gersh.

Unnumbered check dated November 8, 1943, to Corn Exchange Bank Trust Company, pay to the [p. 580] order of cash, $10,000, signed "The Cash Box, by Bill Gersh," and endorsement, "Bill Gersh."

Check No. 1630, dated November 12th, 1943, to Corn Exchange Bank Trust Company, New York; pay to the order of cash, $20,000, signed Bill Gersh and endorsed Bill Gersh.

Check No. 1736, dated January 13th, 1944; to Corn Exchange Bank Trust Company, cash, $7,250; endorsed Bill Gersh.

Check No. 1780, February 1, 1944, Corn Exchange Bank Trust Company, pay to the order of Advance Automatic Sales Company, $22,750, signed Bill Gersh. I find no endorsement other than the stamp, "The National N.T. & S.A."

Mr. Friedman: National Trust and Savings Association?

Mr. Campbell: Apparently. Bank clearance stamp.

Mr. Friedman: What?

Mr. Campbell: Bank clearing stamp.

Q. (By Mr. Campbell): With reference to the check which I read you of January, 1944, $7,250, drawn in cash, is that the money used in the purchase of those ten music boxes, plus the $2,000 of parts. A. Yes, sir.

Q. Now, with the exception of the two checks which I read to you, one of which was payable to Lou Wolcher and the other to Advance Automatic Sales Company, was all the balance of the money transmitted in cash? A. Yes, sir, it was.

Q. You are positive, are you, Mr. Gersh, you [p. 581] never at any time took any part in the securing or procuring of whiskey from Mr. Wolcher? A. No, sir, none.

* * * * * * * * * * *

[p. 585]

WILLIAM GERSH

called as a witness on behalf of the Government in rebuttal, resumed the stand, previously sworn.

Cross-Examination (Resumed)

By Mr. Friedman:

Q. Well, let me hand you Defendant's Exhibit G for identification, which are the bank statements that you furnished me with just before recess. As I understand your testimony, you first received a check or a draft from Mr. Wolcher for $5,000, is that correct? A. That's right.

Q. When did you receive it? A. Oh, here's the date on here. It is June 15, 1943.

Q. Now you are now looking at your bank statement? A. Yes, sir.

Q. That is when it was deposited? A. Yes, sir.

Q. Then you say you withdrew that and sent it back to him, is that right? A. Yes, sir.

Q. What date did you withdraw it? A. The same day, sir.

[p. 586] Q. The very same day? A. Yes, sir.

Q. What was the next amount you received from Mr. Wolcher? A. Well, I think that was the $3,300.

Q. Well, now, when did you receive that? A. Oh, that is on August 12th.

Q. I see. And is that the date you deposited it in your account? A. No, that was—no, it was deposited on August 11th. I am sorry.

Q. On August the 11th? A. Yes.

Q. And when did you withdraw that amount? A. August 12th.

Q. August 12th. Now in each of these instances, when you withdraw the $5,000 on the same day you deposited it, you withdraw it by check? A. Yes, sir, I made a check.

Q. Let me hand you, so that you may refresh your memory, what is now Government's Exhibit 38, which is a set of photostat checks; referring to the $5,000, how did you withdrew it from the bank? A. Withdrew it in cash, sir.

Q. In cash. In other words, you withdrew—you drew a check payable in cash? A. Yes, sir.

Q. Did you endorse it? A. Yes, sir.

Q. That is the only endorsement it bears? A. That's right, sir.

Q. And you received $5,000 in cash for it? A. Yes, sir.

[p. 587] Q. All right. Now, as to the $3,300 check, how did you withdraw that from the bank? A. That is also withdrawn in cash.

Q. In the same way, a check that you drew to cash, indorsed and got the cash at the bank, is that right? A. Yes, sir.

Q. What is the next amount you received from Mr. Wolcher? A. Well, it is—let me see now. I think the next was $5,000 also.

Q. Yes? What date? A. I am looking for it now. Here

it is. It is—oh, that was September 7th. It is marked here. Let me see. No, it comes back here; August 31st.

Q. Yes, What date did you receive it? A. August 31st was the date it was deposited.

Q. Was that the day you received it? A. I imagine I did, sir.

Q. And how did you withdraw that? A. That was withdrawn by check, made to Lou Wolcher.

Q. Yes? A. The check is dated August 31st and sent right back to him.

Q. In other words, you received $5,000 on August 31st, you deposited it in your bank, drew a check against it and sent it right back to Mr. Wolcher? A. That's right, sir.

Q. All right. What is the next amount you received? A. Well, there is, according to this check here, $12,500.

[p. 588] Q. What date did you deposit that? A. That was deposited on October 2nd.

Q. Yes, the 2nd of October. A. That's right.

Q. And when did you withdraw it? A. October 13th.

Q. How did you withdraw it? A. Drew that in cash.

Q. That is the same as those first two cash checks—check drawn to cash, endorsed by you and you received the currency or money, whatever it was, at the bank for it? A. That's right, sir.

Q. And the next amount? A. Well, the next amount was this $30,000 check which was cashed right in the bank, their own bank check.

Q. All right. You received $30,000 and there was a $30,000 check. That was deposited on what date? In your account?

Mr. Campbell: Just a moment. That question is assuming a fact not in evidence, that he received $30,000.

Mr. Friedman: Well, he deposited it in his account. A. Yes, sir. this is the check that Mr. Wolcher brought into the bank and they forced me to draw a check against my account and handed it to him right there.

Q. (By Mr. Friedman): So somebody forced you to. A. Well, they didn't force me. I should'nt use the word.

But they wouldn't cash it unless I de- [p. 589] posited it to my account and gave him—in short, they wouldn't honor payment on his check even though it was a draft or a cashier's check.

Q. All right. Now let's stop a minute. Mr. Wolcher has a check for $30,000. A. Yes, sir.

Q. And according to your testimony he wants it cashed? A. That's right, sir.

Q. And you and he went to the bank? A. That's right, sir.

Q. Now what happened when you got to the bank? A. Well, Mr. Wolcher wanted this check cashed in thousand dollar bills.

Q. Yes? A. The bank at the time said they didn't have that many thousand dollar bills.

Q. Well, now before the bank said that you must have said something to the bank; Mr. Wolcher didn't know anybody at the bank as far as you know, did he? A. I just handed the check in and I said "Could we have thirty $1,000 bills for this draft?" or cashier's check or whatever it is called.

Q. Had you endorsed it before you handed it in to get it cashed. A. I don't think so. I think we just handed it in. I don't remember that, sir.

Q. Didn't you say, "This is my friend, Mr. Wolcher; he would like to get a check cashed"? A. I wouldn't remember that, sir. I might have.

Q. Well, now, if you were just going there to get [p. 590] a check of this kind cashed, you would have endorsed it before you presented it? A. Well, there was no need for it; it was a draft or a cashier's check or something.

Q. It was made payable to somebody, wasn't it? A. Well, I don't know. I don't remember that.

Q. You don't remember that? A. I don't remember what it was—I don't remember, to recall the surrounding circumstances.

Q. Well, anyway, you had some negotiations with the bank teller about getting thirty $1,000 bills? A. Yes, sir.

Q. The bank told you they didn't have than many on hand or something to that effect? A. That's correct.

Q. What else did he say? A. Well then, he said that they couldn't accept this check immediately because they would still have to clear it.

Q. I see. A. So they said they wanted it deposited to my account, and then he said, "Well, we can let you have ten $1,000 bills and you make out this blank check, fill it out and we will withdraw ten $1,000 bills."

Q. Now this was all at the suggestion of the man at the bank? A. Yes, sir.

Q. You didn't suggest, "We will deposit it to my account and I will give Mr. Wolcher whatever money I have available?" You didn't suggest that? A. I don't think I did, sir.

[p. 591] Q. No. So the bank teller suggested that you deposit it in your account? A. That's correct.

Q. Then what did you do? A. Well then I made out this bank check which is one of their own blanks lying in the bank there, for the $10,000, and we gave them ten $1,000 bills.

Q. Well, now, you drew a check, you have it there before you. Who did you make the check payable to? A. The check is made payable to cash, naturally—being drawn from my account.

Q. Made payable to cash and endorsed by whom? A. It has got to be endorsed by me.

Q. Yes? A. Yes, certainly.

Q. And then you received ten $1,000 bills, or did he hand them to Mr. Wolcher? A. Oh, he handed them to me, naturally, sir.

Q. I see. Then you handed them to Mr. Wolcher? A. Quite so.

Q. Can you think of any reason why at that time, having deposited $30,000 in your own account, that belonged to Mr. Wolcher, you didn't make a check to Mr. Wolcher for $10,000 at that time?" A. I didn't think of that, sir.

He wanted it cashed, he wanted cash and we were interested in helping him get the check cashed.

Q. I see. So you just didn't think of it that way. Well, when did you draw the balance out, of $20,000? A. Well, here it is—about four days later he called me up and met me at the bank and we with-[p. 592]drew the balance of it in thousand dollar bills—twenty $1,000 bills.

Q. Yes? A. And we handed it to Mr. Wolcher.

Q. And when you say "we" withdrew it, how did you withdraw it? A. We had to make a check to $20,000 in cash.

Q. "We," or you? A. I had to do it.

Q. I see. You made a check for $20,000 in cash? A. That's right.

Q. Payable to cash? A. That's right.

Q. You endorsed it? A. Right.

Q. Received $20,000—twenty $1,000 bills? A. That's right.

Q. Again, you didn't suggest that you make the check for $20,000 payable to Mr. Wolcher at that time and then have it cashed while you were there to verify his signature? A. No, sir.

Q. I see. Never dawned on you to do it that way?

Mr. Campbell: Objected to as argumentative, if the Court please. He has stated what he has done.

The Court: The objection will be sustained.

Mr. Friedman: Well, I am trying to find out what he didn't do and why.

Q. All right, what is the next amount of money you received from Mr. Wolcher? A. That is that $30,000 which is deposited to my account here on January—that's not very legible. It is about January 4th I guess.

Q. Yes, and how did you receive that money? A. In cash.

[p. 593] Q. Yes? A. M-hm.

Q. In thousand dollar bills? A. No, it was all sorts of bills.

Q. All sorts of bills? A. Yes, sir.

Q. Big package? A. Big package, yes, sir.

Q. I see. When did you first count it? A. Well, when it came into my office. Q. I see. And you took it to the bank and deposited it? To your account on the fourth of January? A. Yes, sir.

Q. And how long did you keep that money? A. Well, on the 13th there is $7,250 issued, and on the balance here a check for the balance of—what is it, $22,000 something. And it is right here, I imagine, isn't it?

Q. Well, you drew a check for $7,250 on the 13th of January, is that correct? A. Yes, sir, and—

Q. Is that correct? A. And on February 1st we drew one for $22,750 to Advance Automatic Sales Company.

Q. February 1st? A. Yes, sir.

Q. But the one for $7,250, to whom was that drawn? A. Well, that was $5,250 that went to—well, that was cash, I think that is here. I think that's —yes, here it is: it is in cash.

Q. That was to cash? A. Yes, sir.

Q. And when you say to cash, you mean you drew a check payable to cash for $7,250? A. Yes, sir.

[p. 594] Q. What did you do with that $7,250? A. That is the merchandise we bought for which we had that receipt.

Q. Yes? When did you buy this merchandise? A. Well, around that time, I guess.

Q. When did you pay for it? A. Went over and paid for it in cash just about that time.

Q. Didn't pay for it? A. I can't recall all the instance

Q. Didn't you pay for it by check? A. No, we paid for it in cash.

Q. Paid for it— A. We got a receipt for it.

Q. Where did you go to pay for it? A. Went over to Runyon's Sales Company.

Q. That is in New York? A. No; they are in New York now; I think at that time they were in Newark.

Q. Well, you went over to Newark to pay for it in cash, is that right? A. Yes, sir.

Q. And that was $5,000 what? A. $250 or $7,250 merchandise. I don't remember the entire incident, but I know there was $5,250 worth of phonographs.

Q. Well, there is a receipt here somewhere? A. That's right.

Q. Now did you wait until it was your time to go over to Newark to pay for this bill to draw the money out of the bank? [p. 595] A. I don't understand that. I don't understand what you mean.

Q. Well, you withdrew $7,250 out of the bank? A. Yes, sir.

Q. And you went over to Newark and paid the Runyon Sales Company some money? A. Yes, sir.

Q. How long after you drew the money was it that you paid the Runyon Sales Company? A. Oh, I couldn't remember that, sir. I don't remember that, sir.

Q. You don't remember that? A. No, sir.

Q. Well, have you any idea whether it was the same day or the next day or the month afterwards? A. No, I couldn't recollect that, sir.

Q. No recollection at all? A. No. It wasn't the next—I don't remember that, sir.

Q. Well, you drew the money out for the purpose of paying the Runyon Sales Company, isn't that right? A. Yes, sir.

Q. Now the receipt which you have produced here is dated January the 26th, 1944, "Received from Bill Gersh payment in full for ten music machines, shipped to Advance Automatic Sales Company, San Francisco, California, $5,250"? A. That's right.

Q. "Runyon Sales Company," by somebody or other. Is that right? A. Yes, that is; that is what it says there.

Q. So it was thirteen days after you drew the [p. 596] money out of the bank before you made this payment you are talking about? A. That is the—oh, yes, sir, you are right.

Q. What's that? A. That's right, sir.

* * * * * * * * * * *

[p. 601] Q. * * * Now going back to this first $5,000 in June. That was sent to you in cash, was it? A. I wouldn't recollect. I can't recollect whether it was actually in cash or by check. Usually it came to me by cash.

Q. I see. Well, you don't recall whether you got it in cash or by check? A. No, I can't recall exactly.

Q. Did any letter of instruction accompany it? A. Well, they would usually phone us, and always the instructions were—sent it back the way I sent it to you.

Q. Well, now, I am talking about this $5,000, not what he usually did. [p. 602] A. You might have phoned us and told us to send it right back.

Q. And he might not. Well, if he didn't, what did he do? If he didn't phone you, what did he do? A. We sent it back immediately, the same day; so he must have phoned us.

Q. Well, we will get around to sending it back. He sent it to you first, didn't he? A. Yes, sir.

Q. He must have conveyed some information to you as to *when* he was sending you $5,000 for? A. Oh, I didn't understand your question. He wanted us to buy equipment with it.

Q. What kind? A. Coin-operated machines. He was looking for slot machines, consoles, phonographs, various equipment.

Q. And how did he convey that information to you? A. Usually by telephone.

Q. I am talking about this $5,000. A. Yes, sir, this $5,000.

Q. He phoned you about it? A. Probably, yes, sir.

Q. What did he say, "I am sending you $5,000, Bill; send me some machines"? A. Probably said that.

Q. He probably did. Do you know what he said? A. I couldn't recall—1943, these conversations.

Q. I see. But you sent it back to him the same day? A. Yes, sir.

Q. Why? A. Because when we looked around and—he [p. 603] might have phoned me and asked it to come back

the same day. He did that a few times. I think this might have been one of the instances.

Q. You think this is one of the instances? A. It might have been one of the instances when it was received and we received a phone call—had deposited it already and sent it right back to him.

Q. How did you send it back to him? A. In cash, the way he instructed, the way he sent it to us.

Q. What did he say to you about so far as instructing you to send this money back in cash? A. He said, "Send it back the way you received it."

Q. You had already deposited it in your bank? A. Yes, sir, already deposited it.

Q. I see. And how did you send it back to him? I mean, by what mode of conveyance? A. Usually by airmail, the way he sent it to us.

Q. Airmail, registered? A. Might have registered it; I don't remember, sir. I usually didn't.

Q. You don't remember? A. We would send it airmail special delivery.

Q. Just put the currency in an envelope and mail it back to him? A. Yes, sir.

Q. Send any letter along with it? A. I wouldn't recall, sir.

Q. You had deposited it in your bank. Did you ask them for any receipt to show you had got it back again, that you had sent it back again? [p. 604] A. No, sir.

Q. Now the second payment, $5,000—No, $3,300, is that right? A. That's right.

Q. How did you receive that, by check or by cash? A. I think we received that in cash, too, sir.

Q. Yes, any instructions accompany that? A. I wouldn't recall, sir. I wouldn't be able to recall that.

Q. What did you get it for? A. Well, usually—Oh, you mean any instructions that came? Usually he would tell us in advance. I think there was some type of equipment he wanted that amounted to that money, amounted to that

much money, because we deposited—we couldn't obtain it, and we sent it back to him on the next day.

Q. Well, where did you try to find this equipment? A. Oh, we would usually call around or walk down on Tenth Avenue in New York and ask various jobbers if they had it, or maybe we would make some phone calls around to various different cities.

Q. Maybe; do you? A. We usually did, sir.

Q. I see. Well then, within the course of a business day you knew you couldn't get what he wanted, is that right? A. Yes, sir.

Q. And you sent him back the money? A. Yes, sir.

Q. The $3,300? A. Yes, sir.

[p. 605] Q. Are you sure of that? A. Yes, sir, it is marked here, sent it right back.

Q. Where is it marked? A. Oh, I mean, we withdrew the cash and sent it back to him.

Q. I see. A. Every penny he ever sent us.

Q. Every penny he ever sent you. So you withdrew this $3,300 and sent it back to him? A. Yes, sir.

Q. Now the next amount was $5,000. How did you receive that? A. I wouldn't recall. Probably received—might have received it in cash or might have received it by check. Probably—I wouldn't recall that now. I can't recall how it was received. Usually most of the money he sent us was cash.

Q. I see. What instances can you recall when he sent you cash? A. The only thing I recall here is when he came in with his $30,000 check to have it cashed by us. That was the draft or cashier's check.

Q. All right, $5,000 on August 31st? A. Yes.

Q. You say you got $5,000. You think it was cash? A. Yes.

Q. What instructions did you get as to that? A. I made him a sale. He might have been in town, for all I know.

Q. Listen to my questions, Mr. Gersh. What [p. 606] instructions accompanied the $5,000 from Mr. Wolcher? A. I wouldn't recall that now. I can't recall those. That

is in the past. Probably he sent me the money like he always did to buy something with it.

Q. Yes. A. And probably he wanted me to buy some merchandise of some kind, and if I didn't buy it, I gave him back his check, that's all, gave him back his money.

Q. When? A. It is marked here on August 31st. I made a check to him.

Q. August 31st? A. Yes, sir.

Q. You sent that back by check? A. He might have been in town. He might have picked this up in town.

Q. You don't know? A. I wouldn't be positive, sir. I can't remember all the times he was in New York.

Q. At least we have a check made out to Mr. Wolcher now? A. Yes, sir.

Q. All right. What is the next amount you received. A. That is—

Q. $12,500? A. Yes, sir.

Q. Right ? A. I can check it up right here.

Q. October 2nd? A. Yes.

Q. How did you receive that money? A. Cash, sir.

[p. 607] Q. Cash? What makes you so positive that was cash. A. Because I remember most of those transactions were in cash. He sent me, always sent me cash, and I think this was one of those that came in cash. The amount sounds that way to me.

Q. You don't recall receiving the $12,500 check? A. I wouldn't—no, I wouldn't recall definitely on the check, sir.

Q. I show you this photostat. A. Very well. That's right.

Q. Do you recall seeing the original of that? A. Possibly, yes.

Q. Look on the check, on the back of it, and see if you recognize the endorsement? A. Yes.

Q. Whose endorsement is on it? A. That is my endorsement, "Bill Gersh," that's right.

Q. So you received the $12,500 by check? A. That's right.

Q. Is that right? A. That is right.

Q. How long did you keep it? A. Oh, about a week or so, wasn't it? I don't remember.

Q. Well, you deposited it on the 2nd and withdrew it on the 10th?

Mr. Campbell: 13th.

A. 13th.

Q. (By Mr. Friedman): 13th? A. Yes, sir.

Q. What did you try to do for that check in the meantime? [p. 608] A. Well, I don't recall now, but I know we did dig for equipment at that time. We were looking for some equipment.

Q. You have no recollection what you were trying to find for as large a sum as $12,000? A. No, sir.

Q. And evidently you didn't find it? A. No.

Q. You sent the money back? A. Yes.

Q. How? A. By cash.

Q. How did you send back this $12,500? By airmail, or just ordinary mail, or how? A. Probably either way. Airmail, I imagine.

Q. You imagine it went airmail? A. Yes.

Q. Did you have a conversation with Mr. Wolcher about the return of this money? A. I think so.

Q. When did that take place? A. I can't remember that. He used to 'phone us and tell us to send it back. "Did you get anything? No? Well, send the money back," and I would send the money back.

Q. You would send it back to him? A. Yes.

Q. And having sent back this $12,500, you didn't receive any more money, according to your testimony, from October to January, when you got this $30,000? A. Not that I recall. That is all I have here.

Q. Is that right? A. That is what I think, sir.

[p. 609] Q. And on January 26th you made this purchase from the Runyon Company. A. Yes, sir.

Q. So am I correct, then, in stating that from the time Mr. Wolcher sent the $5,000 on January 15th in 1943, and then $3,300 in August, and then $5,000 in August, and then $12,500 in October, and then $30,000 on January 4th, you

didn't purchase one piece of equipment for him, one coin machine for him, until the 26th of January, 1944; is that correct? A. That is right.

* * * * * * * * * *

[p. 613] Q. Do you recall of giving a statement at the office of the Intelligence Unit of the Bureau of Internal Revenue, 253 Broadway, New York, New York, on March 16th, 1949? A. Yes, sir, they did call me in. I don't remember the exact date.

Q. No. Do you recall that Mr. Appling, the gentleman sitting here, questioned you back in New York? A. Yes.

Q. You recall that? A. Yes, sir.

Q. I will ask you whether or not at that time and place the following question was not asked you, to which you gave the following reply:

"Q. According to your previous statement here, that $30,000 was accounted for by $5,250 being spent by you for juke boxes for Mr. Wolcher and $2,000 went in the form of cash for awhile for the purchase of spare parts, $2,000 was converted to a cashier's check at the West Side Trust Company, Newark, New Jersey, and mailed to Wolcher; is that correct?

"A. That must be correct."

[p. 614] Mr. Campbell: At this time may I see the transcript from which counsel is purportedly reading, if the Court please?

Mr. Friedman: You may, but may I ask in return that, have you got the original of this?

Mr. Campbell: I don't know.

Mr. Friedman: The Treasury Department sent you a lot of files. It ought to be in there somewhere. (Handing document to Mr. Campbell.)

Q. (By Mr. Friedman): Did you so testify? A. I probably did, sir, if it is there.

Q. Have you any recollection of so testifying? A. Well, I recollect testifying before those people.

* * * * * * * * * *

[p. 629] Recross-Examination

By Mr. Friedman:

Now, Mr. Gersh, in this statement which is now Government's Exhibit No. 40 for identification, which is a statement given by you to Special Agent Mr. Vincent J. Aquino on September—on August 31, 1944, in New York, I will ask you whether the following questions were not asked of you to which you gave the following replies:

"Question: Mr. Gersh, I have examined both your Cash Box account at the Corn Exchange Bank and also the Cash Box cash receipts and disbursements book, together with cancelled checks and check stubs, and in these records I find that you deposited the following. We will take the disposition and explanation for each as we go along. On June 15, 1943, the records [p. 630] show a deposit of $5,000. Would you please state from whom that $5,000 was obtained?

"Answer: That was from Mr. Louis E. Wolcher.

"Question: Do you recall whether that money was given to you in cash?

"Answer: I believe that money was sent to me in cash.

"Question: By the medium of what?

"Answer: I think, if I remember correctly, just a plain envelope.

"Question: By mail?

"Answer: By mail.

"Question: Do you recall whether it was registered or insured or anything of that nature?

"Answer: No, I don't. That's due to my opening so much mail every day.

"Question: This $5,000 was given you by Wolcher for the purpose of your buying for him certain machines?

"Answer: That's right.

"Question: On the same day you issued a check on the Cash Box payable to the order of Cash for $5,000; do you recall what you did with that cash?

"Answer: Yes, I purposely deposited that money so that there would be a record of it, that I had received it and all that. And I withdrew the cash, held it with me for awhile and then returned it to him, because we used to talk [p. 631] long distance. He would call me—he is a famous long distance talker—and after he would call me, I would say, 'Lou, I have this cash. Now I haven't been able to do anything with it. Haven't been able to get a real buy. What do you want me to do?' He'd say, 'Just send the cash right back.' I would say, 'All right, if that is the way you want it, you are taking the chance.'

"Question: How would you send this cash back?"

Mr. Campbell: Just a moment. I am going to make an objection—

Q. (By Mr. Friedman) (Continuing):

"Answer: I would put it in an airmail special delivery envelope—"

Mr. Campbell: Pardon me just a moment. I am going to make an objection at this point to a very long, compound question, apparently consisting of many questions and answers.

* * * * * * * * * *

[p. 634] The Court: However, I will allow the jury to determine whether there is a conflict; in the interest of time, we will proceed. You may read it.

Mr. Friedman: Yes.

Q. (By Mr. Friedman): Well, I will ask you if those questions were asked of you, to which you gave the replies as set forth in those statements? A. They probably were, sir.

Q. You mean if they are in here, that is what you said? A. They probably were exactly what I said.

Mr. Friedman: Very well. I offer in evidence the part I have just read.

Mr. Campbell: I offer in evidence the entire document.

Mr. Friedman: I have no objection whatsoever.

Mr. Campbell: Very well.

The Court: Let the document be entered, admitted next in order.

The Clerk: Government's Exhibit No. 40 received and filed in evidence.

[p. 635] (Whereupon Government's Exhibit No. 40 for identification only was received in evidence.)

Mr. Friedman: There are two copies here. You are just offering the first eleven or so pages, is that right?

Mr. Campbell: That's right.

Mr. Friedman: All right. Thank you.

Mr. Campbell: You are welcome.

Q. (By Mr. Friedman): Now I will ask you, calling your attention to this question:

"Question: On August 12—"; which is now Government's Exhibit 40.

Mr. Friedman: Is that right?

The Clerk: Yes.

Q. (By Mr. Friedman): No. 40.

"Question: On August 12th, 1943, you issued a check to cash, pulling out that $3,300 that we just spoke about. What happened to that money?

"Answer: I believe that at that time I was making a trip somewhere around here in the east. I don't recall my trips. And I thought I could use that money to buy some phonographs for Mr. Wolcher. Not being able to, I think we were instructed by him to just return the money, and I believe that we phoned him or I phoned him, rather, and asked him what he wanted me to do, that I couldn't do any good [p. 636] for him, and he said, 'just send it back to me,' or as close thereto as the wording I remember."

Mr. Campbell: Objected to as not being an impeaching question.

Q. Did you take a trip with this $3,300 and attempt to buy phonographs? A. No, sir I don't think that is the way it sounds to me. I think I meant I took trips and I saw opportunities to buy. I don't say I took it with that $3,300, sir.

Q. I see. That is your explanation? A. That is the way it sounds to me.

* * * * * * * * * *

AUG 13 1956
JOHN T. FEY, Clerk

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and rule involved	2
Statement	3
Argument	6
Conclusion	11

CITATIONS

Cases:

Aetna Ins. Co. v. *Licking Valley Milling Co.*, 19 F. 2d 177	7, 8, 9
Brandon v. *United States*, 190 F. 2d 175	6
Clune v. *United States*, 159 U. S. 590	8
Evans v. *United States*, 122 F. 2d 461, certiorari denied, 314 U. S. 698	6
Goodman v. *United States*, 97 F. 2d 197	11
Guthrie v. *United States*, 207 F. 2d 19	9
Harrison v. *United States*, 191 F. 2d 874	6
Heald v. *United States*, 175 F. 2d 878, certiorari denied, 338 U. S. 859	11
Johnson v. *United States*, 32 F. 2d 127	6
Lutwak v. *United States*, 344 U. S. 604	8
Nilva v. *United States*, 212 F. 2d 115, certiorari denied, 348 U. S. 825	11
Pietrzak v. *United States*, 188 F. 2d 418, certiorari denied, 342 U. S. 824	9
St. Clair v. *United States*, 154 U. S. 134	7, 8
Thompson v. *United States*, 188 F. 2d 652	6
United States v. *Johnson*, 327 U. S. 106	6
Wicker v. *Scott*, 29 F. 2d 807	9
Wolcher v. *United States*, 200 F. 2d 493	3
Wolcher v. *United States*, 218 F. 2d 505, certiorari denied, 350 U. S. 822	3

Page

Statute:
Internal Revenue Code of 1939, Sec. 145 (b) (26 U. S. C. 1952 ed., Sec. 145) 2

Miscellaneous:
Federal Rules of Criminal Procedure, Rule 33 2
4 Wigmore, *Evidence* (3d ed.):
Sec. 1048 8
Sec. 1069 8
Sec. 1079 8
6 Wigmore, *Evidence* (3d ed.), Sec. 1750 9

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 253

LOUIS E. WOLCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–7a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 7a; No. 14,919, R. 77)[1] was entered on May 15, 1956, and a petition for rehearing was denied on June 15, 1956 (No. 14,919, R. 78). The petition for a writ of certiorari was filed on July 13, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] The record of petitioner's second trial is designated "R." The record of proceedings on petitioner's motion for a new trial, which gives rise to the present petition, is designated "No. 14,919, R."

QUESTION PRESENTED

Whether the trial court abused its discretion in denying petitioner's motion for a new trial on the ground of newly discovered evidence.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

Federal Rules of Criminal Procedure.

RULE 33. NEW TRIAL.

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new

judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

STATEMENT

On October 4, 1950, petitioner was indicted in the United States District Court for the Northern District of California, Southern Division, for wilful attempted evasion of $30,276.06 of his individual income taxes for the fiscal year ended June 30, 1944. (R. 3-4.) After a jury trial held in April and May, 1951, petitioner was convicted, but the Court of Appeals reversed for errors in the admission and exclusion of evidence. *Wolcher* v. *United States*, 200 F. 2d 493 (C. A. 9th). After a second jury trial, lasting approximately five days, petitioner was again convicted. (R. 6.) On September 4, 1953, he was sentenced to imprisonment for two years and fined $10,000. (R. 18–20.) The Court of Appeals affirmed, *Wolcher* v. *United States*, 218 F. 2d 505, and this Court denied certiorari, 350 U. S. 822. On September 2, 1955, petitioner filed a motion for a new trial on the ground of newly-discovered evidence. (No. 14,919, R. 3–12.)

The facts leading to petitioner's conviction are set out rather fully in the Government's brief in opposi-

tion to the first petition for certiorari (No. 77, October Term, 1955, pp. 3–9) and may be summarized briefly here:

During 1943 petitioner purchased 5,138 cases of liquor for his own account from licensed San Francisco wholesale distributors. All but 500 cases originated with out-of-state suppliers. (R. 347–353.) According to the distributors' records and the testimony of their representatives, petitioner paid the applicable O. P. A. ceiling prices for this whiskey. (R. 46, 56–57, 62, 95–97, 106, 120–122.) About 1,500 cases were resold by petitioner to bars and taverns in which he or his relatives had a proprietary interest. He sold the remaining 3,638 cases at wholesale at prices ranging from $20 to $30 per case above O. P. A. ceiling prices, the over-ceiling portion being received in currency. (R. 158–159, 164, 174–175, 179–180, 184–187, 202–206, 223–227, 247–250, 263–288, 347–348, 411, 422, 428, 436.) None of these wholesale transactions appeared on petitioner's books or income tax return. (R. 326, 328, 366.)

Petitioner testified that he had not recorded the wholesale transactions on his books because he did not want to get into trouble with the O. P. A. (R. 366, 405, 406) and had not reported them on his income tax return because his profits were approximately offset by some $115,000 which he had paid to one William Gersh, who was instrumental in securing the whiskey (then a scarce commodity) for him. (R. 353–369, 381, 409–411.) Petitioner introduced documentary proof that he had made a net transfer of $12,500 to Gersh during the pertinent period (R. 370-

384), and claimed that he had also sent or given Gersh additional funds, approximately $100,000, in currency (R. 358–361, 369, 379, 399.) Gersh (who had testified for the Government as a rebuttal witness at the first trial) was not called as a witness by either side at the second trial.

Petitioner's motion for a new trial, so far as here pertinent, was based upon an affidavit of one Edwin Corriston dated July 30, 1955, to the effect that in 1943 Gersh told him that petitioner was having difficulty in getting whiskey and had sent him (Gersh) cash for making over-ceiling payments for whiskey obtainable in the East; that Corriston suggested Gersh get in touch with a whiskey dealer named Frank Mayer; that some months later Gersh told Corriston that because Mayer had run out of whiskey he would like to have the names of other possible suppliers, whereupon Corriston recommended Garry Taylor and Hymie Carlin; that Corriston then arranged a meeting between himself, Gersh and Taylor, at which Taylor demanded a $10,000 down payment; that Gersh handed Taylor an envelope saying that it contained "ten big ones"; and that shortly thereafter Gersh thanked Corriston for the contact with Taylor and said that everything looked good. (No. 14,919, R. 13–16.)

The judge who had presided at petitioner's trial heard and denied this motion for a new trial on alleged newly-discovered evidence. (No. 14,919, R. 26.) The Court of Appeals unanimously affirmed, holding (1) that the proposed new evidence would be inadmissible as hearsay and (2) that this evidence would, in any

event, be unlikely to produce any result different from the finding of petitioner's guilt reached by two juries. (Pet. 1a–7a.)

ARGUMENT

The findings of trial courts on motions for new trial based on newly-discovered evidence should remain undisturbed except for most extraordinary circumstances. *United States* v. *Johnson*, 327 U. S. 106, 111. This is especially true where, as here, the judge who presided at the trial passes on the motion for new trial. *Id.* at 112; *Harrison* v. *United States*, 191 F. 2d 874, 876 (C. A. 5). It is well settled that before the motion may be granted five factors must ordinarily be present: (1) the evidence must have been discovered since the trial; (2) facts must be alleged from which the court may infer diligence on the part of the movant; (3) the evidence must not be merely cumulative or impeaching; (4) it must be material; and (5) it must be such that on a new trial it would probably produce an acquittal. *Johnson* v. *United States*, 32 F. 2d 127, 130 (C. A. 8); *Evans* v. *United States*, 122 F. 2d 461, 468–469 (C. A. 10), certiorari denied, 314 U. S. 698; *Brandon* v. *United States*, 190 F. 2d 175, 178 (C. A. 9); *Thompson* v. *United States*, 188 F. 2d 652, 653 (C. A. D. C.).

In the light of these familiar principles, it is clear that the two courts below were correct in rejecting petitioner's motion. For, as the Court of Appeals held, the proposed new evidence was plainly hearsay, outside any exceptions to the hearsay rule, and would have been insufficient, even if admissible, to warrant an-

other new trial. This conclusion, keyed to the particular facts of this case, presents neither a conflict nor any problem of general importance warranting review by this Court.

1. The matters set forth in Corriston's affidavit (No. 14,919, R. 13–17), on which petitioner stakes his case, are the clearest kind of inadmissible hearsay, consisting almost entirely of things Corriston says Gersh told him. True, Corriston does say that as a result of conversations he had with Gersh and Taylor, he arranged a meeting between them at which he saw Gersh hand Taylor an envelope apparently containing $10,000 in cash. But there is nothing to connect this with petitioner except Gersh's alleged oral statements—hearsay—to Corriston.

In an effort to surmount the hearsay objection, petitioner argues (Pet. 16–25) that "[m]ost of Corriston's testimony" would have been admissible because, if petitioner is to be believed, he and Gersh were co-conspirators in a scheme to violate O. P. A. regulations and therefore Gersh's declarations were competent as those of a co-conspirator. To this petitioner adds that the hearsay statements of Gersh to which Corriston would have testified were part of an amorphous "*res gestae*" and would have been admissible on this score. These arguments are unsubstantial, as is petitioner's claim of inconsistency between the decision below and the decisions in *St. Clair* v. *United States*, 154 U. S. 134, and *Aetna Insurance Co.* v. *Licking Valley Co.*, 19 F. 2d 177 (C. A. 6).

a. Declarations by a co-conspirator stand on the same footing as those of the party himself. They may, therefore, be received against, but not for, the party. 4 Wigmore, *Evidence* (3d ed.), Secs. 1069, 1079. Cf. *Lutwak* v. *United States,* 344 U. S. 604, 617; *Clune* v. *United States,* 159 U. S. 590, 593. A party's testimonial utterances violate the hearsay rule if offered for him (since there is nothing especially trustworthy about a self-serving statement) but not when offered against him, because he obviously cannot complain of lack of opportunity to cross-examine himself. 4 Wigmore, *Evidence* (3d ed.), Sec. 1048. There is nothing inconsistent with these familiar rules in *St. Clair* v. *United States, supra,* for the declarations there involved were received *against* the co-defendants, not in their favor. Clearly, Gersh's alleged statements to Corriston do not become competent evidence for petitioner on the theory that he and Gersh were co-conspirators.

b. Petitioner's references to a *res gestae* of which Gersh's statements are said to have been a part add nothing to the effort to cure the hearsay vice. The alleged utterances, in the situation to which they relate, have none of the elements of unrehearsed spontaneity which would warrant their acceptance under the *res gestae* exception to the hearsay rule. Petitioner's claim of a conflict between this conclusion of the courts below in the instant case and the decision in *Aetna Insurance Co.* v. *Licking Valley Co.,* 19 F. 2d 177 (C. A. 6), is wide of the mark. For the facts

of the two cases are wholly dissimilar,[2] and the application of the broad principle in question "depends entirely on the circumstances of each case." 6 Wigmore, *Evidence* (3d ed.), Sec. 1750, p. 144, citing, *inter alia*, the *Aetna* case; *Pietrzak* v. *United States*, 188 F. 2d 418, 420 (C. A. 5th), certiorari denied, 342 U. S. 824. *Cf. Guthrie* v. *United States*, 207 F. 2d 19, 22–23 (C. A. D. C.).

2. Even if Corriston's testimony were admissible it is not such, when viewed against the factual background of this case, that it would probably produce an acquittal. The evidence showed conclusively that petitioner had sold some 3,638 cases of whiskey at wholesale at prices far in excess of the O. P. A. ceiling prices he had paid the distributors for its acquisition; that petitioner received the excess in currency and kept no record of it; and that there was no indication

[2] The issue in the *Aetna* case was whether an insurance policy had become effective. Plaintiff agreed to place insurance on its mill with one Bennett, an insurance agent, who did not have an agency for the Aetna Company. Plaintiff's manager testified that in his presence Bennett, who represented plaintiff, telephoned Aetna's agent, and that "after the conversation over the phone, he [Bennett] told me the insurance was in effect." (19 F. 2d at 178.) The court, after pointing out that no objection to the testimony appeared in the record, went on to say that it was "disposed to think that the statement was admissible as part of the *res gestae*" because it was made at the close of the telephone conversation. 19 F. 2d at 179. It seems clear that the rationale of the holding is that, in the particular circumstances of that case, Bennett's statement was a spontaneous utterance. See *Wicker* v. *Scott*, 29 F. 2d 807, 809 (C. A. 6).

on his income tax return that he was engaged in any such transactions. *Supra,* p. 4. Petitioner's defense was that he made no profits at all on his wholesale dealings because they were offset by the $115,000 he allegedly paid to Gersh (R. 366, 381, 409–410). He testified that he had never even intended to make a profit (R. 444–445). The Government's proof did not foreclose the possibility that petitioner might have found it necessary to pay some black market premiums to Gersh (R. 405–406) or to others (R. 335–337) in order to get the whiskey. But the issue was not whether petitioner had paid *some* cash premiums, but whether he had wilfully attempted to evade and defeat a substantial part of his income tax. On that issue the evidence was overwhelming, and we cannot conceive that Corriston's testimony (*supra,* p. 5) would have changed the result. The closing sentences of the Court of Appeals' opinion aptly summarize the matter as follows (Pet. 6a–7a):

> Two juries failed to credit appellant's implausible story wherein he pictures himself as a "good fellow" daily running the risk of fine and imprisonment in illegally receiving some $200,000 without any of it "sticking to his fingers", his assertion that he did so in order to obtain liquor for his own taverns, notwithstanding.
>
> The exercise of a sound discretion would dictate that no different result would be reached at a new trial.

Because the proffered testimony of Corriston was plainly not such that it would probably produce an acquittal, petitioner's motion for a new trial was

properly denied. *Nilva* v. *United States*, 212 F. 2d 115, 124 (C. A. 8), certiorari denied, 348 U. S. 825; *Heald* v. *United States*, 175 F. 2d 878, 883 (C. A. 10), certiorari denied, 338 U. S. 859; *Goodman* v. *United States*, 97 F. 2d 197, 199 (C. A. 3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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